

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DRUCILLA COOPER,

Plaintiff,

v.

UNITED AIRLINES, INC.,

Defendant.

Case No.: 13-cv-2870 JSC

**ORDER GRANTING MOTION TO
MODIFY SCHEDULING ORDER TO
ALLOW PLEADING OF AMENDED
ANSWER (Dkt. No. 25)**

Now pending before the Court is Defendant United Airlines, Inc.'s motion to modify the Court's pretrial scheduling order to allow United to file an amended answer to assert an affirmative defense to Plaintiff Drucilla Cooper's Equal Pay Act claim.¹ (Dkt. No. 17.) The

¹ In relevant part, the Equal Pay Act, 29 U.S.C. Section 206(d), provides that:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

1 Court finds this matter suitable for disposition without oral argument. *See* Civ. L. Rule 7-
 2 1(b). Having carefully considered the papers submitted by the parties and the record of the
 3 case, the Court concludes that the motion should be GRANTED.

4 DISCUSSION

5 “To establish a prima facie case of wage discrimination [under the Equal Pay Act], a
 6 plaintiff must show that the employer pays different wages to employees of the opposite sex
 7 for substantially equal work.” *E.E.O.C. v. Maricopa Cnty. Cmty. Coll. Dist.*, 736 F.2d 510,
 8 513 (9th Cir. 1984). In response to Equal Pay Act claims under Section 206(d), a defendant
 9 will commonly defend a disparity in pay as being justified by some “factor other than sex.”
 10 *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1312 (2d Cir. 1995) (discussing “factor other than
 11 sex” as an affirmative defense).

12 When United filed its initial answer to Cooper’s claims for relief, it did not plead a
 13 “factor other than sex” affirmative defense to Cooper’s Equal Pay Act claim. (Dkt. No. 4.)
 14 United’s first mention of the “factor other than sex” defense was made two months after its
 15 answer as part of a joint case management statement, in which it denied “any liability under
 16 the Equal Pay Act and contend[ed] that Plaintiff’s peers were paid higher salaries because of
 17 *factors other than sex.*” (Dkt. No. 15 at 4 (emphasis added).) In that same case management
 18 statement, the parties noted that they “did not intend to amend their pleadings at this time.”
 19 (*Id.* at 5.) Nonetheless, on January 23, 2014, over a month after the deadline for motions to
 20 amend pleadings passed, United filed this motion to amend or modify the scheduling order to
 21 amend its answer to include the affirmative defense of “factor other than sex.” (Dkt. No. 25.)

22 A pretrial conference order “controls the course of the action unless the court modifies
 23 it.” Fed. R. Civ. P. 16(d). Under Rule 16(b), “[a] schedule may be modified only for good
 24 cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). Rule 16(b)’s “good cause”
 25 standard “primarily considers the diligence of the party seeking the amendment.” *Johnson v.*
 26 *Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). “Although the existence or

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 29 U.S.C. § 206(d)(1).

1 degree of prejudice to the party opposing the modification might supply additional reasons to
 2 deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking
 3 modification. If that party was not diligent, the inquiry should end.” *Id.* (internal citations
 4 omitted). Once good cause to modify a scheduling order is shown, “[t]he court should freely
 5 give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). Generally, “leave to amend
 6 should be granted unless amendment would cause prejudice to the opposing party, is sought
 7 in bad faith, is futile, or creates undue delay.” *Johnson*, 975 F.2d at 607.

8 There is good cause to modify the scheduling order. United promptly identified its
 9 “factor other than sex” defense in the joint case management conference statement, so this is
 10 not a situation where a defendant was unaware of a defense because of a lack of diligence.
 11 Moreover, United’s answer with respect to Cooper’s Equal Pay Act claim indicated that
 12 United intended to deny the merits of Cooper’s wage discrimination claim. (*See* Dkt. No. 4 at
 13 ¶¶ 90-98.) Instead, United erred by not also identifying the issue as an affirmative defense in
 14 its answer. It diligently moved to correct this error by negotiating with Cooper to stipulate to
 15 an amended pleading and then promptly seeking leave from the Court when those efforts
 16 proved unsuccessful. (Dkt. No. 25-2.) *See J & J Sports Prods., Inc. v. Maravilla*, No. 12-
 17 2899, 2013 WL 4780764, at *2 (E.D. Cal. Sept. 5, 2013) (motion to amend granted two
 18 months after the scheduling deadline passed because defendant diligently attempted to amend
 19 the pleadings).

20 Plaintiff will not be prejudiced by allowing United to assert a defense of which
 21 Plaintiff has been aware since at least the joint case management conference statement. *See*
 22 *Sousa ex rel. Will of Sousa v. Unilab Corp. Class II (Non-exempt) Members Grp. Benefit*
 23 *Plan*, 252 F. Supp. 2d 1046, 1059 (E.D. Cal. 2002) (good cause found to modify scheduling
 24 order “[b]ecause Plaintiffs have always been on notice of Defendants’ . . . defense”). Little
 25 more than a month has passed since the scheduling order’s amendment deadline and
 26 over six months remain until discovery closes. Moreover, in light of United’s offer to
 27 respond to a new interrogatory regarding any and every fact, document, and witness related to
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1 the amended defense (Dkt. No. 25 at 4), Plaintiff will not be deprived of the opportunity to
2 assert relevant interrogatories.

3 **CONCLUSION**

4 Good cause having been shown, the Court grants United leave to amend under Rule
5 15(a)(2). Plaintiff will not be prejudiced by the amendment, it causes no undue delay, and
6 United is not acting in bad faith. United's proposed amended answer, (Dkt. No. 25-1 at 23),
7 is deemed filed as of the date of this Order.

8 This Order disposes of Docket No. 25.

9 **IT IS SO ORDERED.**

10 Dated: February 28, 2014

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13 JACQUELINE SCOTT CORLEY
14 UNITED STATES MAGISTRATE JUDGE
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United States District Court
Northern District of California